COURT MARTIAL

Citation: *R v Luey*, 2012 CM 2009

Date: 20120809
Docket: 201223

Standing Court Martial

Canadian Forces Base Meaford
Meaford, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Ex-Private C.I. Luey, Accused

Before: Commander P.J. Lamont, M.J.

REASONS FOR FINDING

(Orally)

[1] Former Private Luey is charged with one charge of public mischief in that "with intent to mislead he caused Master Corporal Krull, a military police investigator for the Canadian Forces National Investigation Service, to enter upon an investigation by making a false statement to Sergeant Blais that accused Private Robins of having committed the offence of publishing child pornography." At his trial by Standing Court Martial the prosecution led evidence of a telephone conversation initiated by Private Luey to Sergeant Blais on 20 February 2011. The prosecution also sought to lead the evidence of a recorded conversation between Private Luey and a Military Police Investigator, Master Corporal Krull, that occurred on 9 March 2011. At the request of counsel the court embarked upon a *voir dire* to determine the admissibility into evidence of the recorded conversation as the statements were alleged to have been made to a person in authority and the voluntariness of the statements was in issue. As a second ground, defence counsel sought the exclusion of the evidence of the statements to Master Corporal Krull

on the ground of an infringement or violation of section 10(b) of *The Canadian Charter of Rights and Freedoms*. On the joint request of counsel the court dealt with both sets of issues in the course of a single blended *voir dire*.

[2] The statement in issue on the *voir dire* was made by Private Luey when he attended the police detachment at the request of the police who were following up on the complaint that he had made regarding Private Robins. The conversation was video and audio recorded to the knowledge of Private Luey.

[3] Before a statement that has been given to a person in authority can be admitted into evidence against the maker of the statement, the prosecution must prove beyond a reasonable doubt that the statement was made voluntarily, that is, that it was not made when or because the statement maker might have been significantly under the influence of fear of prejudice induced by threats exercised, or hope of advantage induced by promises held out, in relation to the offence in question, by a person in authority. In the present case, defence counsel for Private Luey concedes that the statements made by Private Luey during the initial part of the conversation are voluntary, but it is submitted that the nature of the conversation changed at a point where the investigator threatened to charge Private Luey with obstructing a peace officer, and that from this point there is a reasonable doubt that the statements were voluntary and that the entirety of the conversation should therefore not be admitted into evidence.

[4] The second ground upon which the defence seeks the exclusion of the evidence of the statements made by Private Luey to Master Corporal Krull is based upon section 10(b) of *The Canadian Charter of Rights and Freedoms* which provides that:

> Everyone has the right on arrest or detention
>
> …
>
> to retain and instruct counsel without delay and to be informed of that right …"

There is no issue that Private Luey was not informed by Master Corporal Krull of his right to retain counsel, but the issue is whether in the course of the conversation Private Luey was detained by Master Corporal Krull so as to give rise to an obligation upon Master Corporal Krull to inform Private Luey of the right to retain counsel.

[5] In the case of *R v Grant* 2009 SCC 32, the Supreme Court of Canada addressed some of the subtle interactions between the police and a citizen that may give rise to a detention for constitutional purposes. The court discussed some of the more common patterns of interaction between the police and members of the public. Those interactions typically begin with the individual enjoyment of the freedom to choose whether to cooperate with the police. The court held that it is only meaningful constraints upon that liberty of choice that give rise to the need to exercise the *Charter* protected rights.

[6] In the present case, in the 9 March 2011 conversation Master Corporal Krull was dealing with Private Luey as a complainant and not as a suspect in a crime. Private Luey attended the police detachment of his own free will knowing that the police wished to follow-up on the complaint that he himself had made to them some two and a half weeks earlier. Early in the conversation Master Corporal Krull specifically told Private Luey that Private Luey did not have to speak to him and that he was free to leave at any time. In the course of the conversation Master Corporal Krull was not satisfied with the information he was getting from Private Luey, and in an attempt to encourage more co-operation he told Private Luey that he was withholding information and that this might amount to obstructing Master Corporal Krull in the course of his investigation which might be a criminal offence under section 129 of the *Criminal Code*. Private Luey nonetheless stuck to his guns and refused to identify the individuals he apparently knew to be involved in his complaint. Again, for the second time, Master Corporal Krull reminded Private Luey that he was "here of your own free will." Private Luey repeatedly refused to give names to Master Corporal Krull despite Master Corporal Krull's repeated requests, and eventually Master Corporal Krull terminated the interview and Private Luey left the police detachment.

[7] On all this evidence I cannot conclude that Private Luey was detained at any stage of his encounter with Master Corporal Krull. There was no deprivation of Private Luey's liberty to speak or decline to speak as he saw fit, or his liberty to come or go as he pleased. Even if Master Corporal Krull's statements to Private Luey are properly interpreted as a threat to charge Private Luey with the offence of obstructing a peace officer if he did not disclose the names, then it is a threat which did not affect Private Luey's behaviour. In my view there was no deprivation of Private Luey's liberty, let alone a significant deprivation that would attract the *Charter* guaranteed right in section 10(b). The *Charter* application fails.

[8] As to the question of voluntariness, I have reviewed the video of the conversation. Private Luey appears fit and healthy, responds properly to questions and gives no hint that his will is overborne by anything that Master Cororal Krull says or does at any point. Although Master Corporal Krull's questioning is repetitive and suggestive of some answers, it is not impolite. A measured conversational tone is maintained. Again, even if the reference to the *Criminal Code* is taken as a threat to charge Private Luey, the threat does not seem to have had any effect upon Private Luey. Notwithstanding Master Corporal Krull's evident frustration with the fact that Private Luey refuses to name names, Private Luey continues to withhold information that Private Luey would be aware is important for the investigation of his complaint about Private Robins. In short, Private Luey is acting and speaking of his own free will throughout the conversation. In all the circumstances I am satisfied beyond a reasonable doubt that his statements to Master Corporal Krull were freely and voluntarily made.

[9] It follows that the evidence of statements made by Private Luey to Master Corporal Krull is admissible, and I so ruled.

[10] The prosecution at court martial, as in any criminal prosecution in a Canadian court, assumes the burden to prove the guilt of the accused beyond a reasonable doubt. In a legal context this is a term of art with an accepted meaning. If the evidence fails to establish the guilt of the accused beyond a reasonable doubt, the accused must be found not guilty of the offence. That burden of proof rests upon the prosecution and it never shifts. There is no burden upon the accused to establish his or her innocence. Indeed the accused is presumed to be innocent at all stages of a prosecution unless and until the prosecution establishes, by evidence that the court accepts, the guilt of the accused beyond a reasonable doubt.

[11] Reasonable doubt does not mean absolute certainty, but it is not sufficient if the evidence leads only to a finding of probable guilt. If the court is only satisfied that the accused is more likely guilty than not guilty, that is insufficient to find guilt beyond a reasonable doubt, and the accused must therefore be found not guilty. Indeed, the standard of proof beyond a reasonable doubt is much closer to absolute certainty than it is to a standard of probable guilt. But reasonable doubt is not a frivolous or imaginary doubt. It is not something based upon sympathy or prejudice. It is a doubt based upon reason and common sense that arises from the evidence or the lack of evidence.

[12] The burden of proof beyond a reasonable doubt applies to each of the elements of the offence charged. In other words, if the evidence fails to establish each element of the offence charged beyond a reasonable doubt, the accused is to be found not guilty.

[13] Sergeant Blais testified that he was the shift i/c at the military detachment at CFB Borden on 20 February 2011 when he received a telephone call from Private Luey.

[14] Private Luey told Sergeant Blais that his room-mate or his friend or perhaps "a guy he knows," one Private Robins, was posting pictures of naked girls on his Facebook page, and one of the girls was 17 years of age. Sergeant Blais could not remember if Private Luey referred to as few as two girls or as many as five girls. The conversation was short and at the conclusion Sergeant Blais passed information to a Corporal Spina instructing him to open a file for investigative purposes, called a SAMPIS file. The file was assigned to Master Corporal Krull who interviewed Private Luey. It is a reasonable inference that Sergeant Blais considered that they were investigating a possible offence relating to child pornography, although he was not specific in his evidence.

[15] The gravamen or nub of the offence in this case is the conversation attributed to Private Luey by Sergeant Blais on 20 February. On all the evidence I am simply not satisfied as to what precisely Private Luey said to Sergeant Blais in the course of this brief conversation. Although Sergeant Blais seems to have considered the matter important enough to open a file and assign an investigator, Sergeant Blais did not make any notes of the conversation with Private Luey at or shortly after the time it occurred. It was not until 10 March, some two and a half weeks later that Sergeant Blais turned his mind to the conversation and made entries in his notebook as to the conversation. Sergeant Blais offered no explanation as to why so much time passed before he made his notes, nor could he explain why he decided to make notes when he finally got

around to it on 10 March. He agreed with the suggestion that his practice in this particular case did not accord with his training. Other details surrounding the conversation he could not recall, perhaps because of his failure to make notes at the time. For these reasons I am unable to determine, with any degree of assurance, the terms of the statements attributed to Private Luey by Sergeant Blais, or to find that any such statement that was given by him was false.

[16] Prosecution counsel submits that the element of intention to mislead is a key issue in this case and he argues that on all the evidence Private Luey intended to mislead Sergeant Blais by falsely reporting an offence of child pornography. I do not make such a finding. Intention is a state of mind to be inferred from all the surrounding circumstances, including what may have been said or done by the person. I find on the basis of Private Luey's statements to Master Corporal Krull that he bore a personal animus toward Private Robins at the time he spoke to Sergeant Blais. But I cannot find that the circumstances point to an intention on his part to knowingly mislead the police in order to make trouble for Private Robins. I find from the statements of Private Luey to Master Corporal Krull that Private Luey was genuinely upset with Private Robins about the material he saw on the Internet, and he was simply giving the police some information, based in part on personal observation but also substantially based on rumour or information he had heard from others, in the expectation that the police would investigate to determine the truth of the rumours. While the information may have been in some respects inaccurate and was certainly insufficient for Master Corporal Krull's purposes, I am unable to find beyond a reasonable doubt that Private Luey intended to mislead Sergeant Blais by making the complaint.

FOR THESE REASONS, THE COURT:

[17] **FINDS** Private Luey not guilty.

Counsel:

Major R.D. Kerr, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Lieutenant-Commander P.D. Desbiens, Directorate of Defence Counsel Services
Counsel for ex-Pte Luey